- **PUBLIC BODY –*DETERMINED NOT TO BE A PUBLIC BODY***
  - ◊ COMMITTEES CREATED AND APPOINTED BY ONE COUNTY COMMISSIONER, ACTING ALONE

- **NOTICE REQUIREMENTS – *CONTENT***
  - ◊ NOTICE REQUIRED TO IDENTIFY THE PUBLIC BODY THAT WILL MEET

- **OPEN SESSION REQUIREMENT - *PRACTICES IN VIOLATION***
  - ◊ DISCUSSION OF PUBLIC BUSINESS BY A QUORUM OF THE PUBLIC BODY'S MEMBERS WITHOUT PUBLIC NOTICE OF THE MEETING

***Topic headings correspond to those in the Opinions Index (2010 edition) at http://www.oag.state.md.us/opengov/openmeetings/appf.pdf**

May 13, 2014

Re: Carroll County Board of Commissioners
Linda Pallay, Complainant

Linda Pallay, Complainant, alleges that the Carroll County Board of Commissioners ("Board"), one of the commissioners, and five committees assembled by that commissioner violated the Open Meetings Act ("the Act") in various ways over the last year. She alleges that the committees discussed public business in meetings that were not open to the public and that a quorum of the Board conducted public business at "Around the County" meetings posted only as events to be held by two members of the Board. She also requests that we investigate the allegations. The Board filed a timely response.

Summary

First, as we will explain below, we conclude from the information available to us that the commissioner's committees were not "public bodies" subject to the Act and therefore did not violate it. Complainant's allegations that the commissioner, acting alone, violated the Act by creating the committees also do not state a violation of the Act; the Act applies only to the meetings of a quorum of the members of a public body.

Second, as to the discussion of public business by a quorum of commissioners at meetings that were not announced as meetings of the Board, we conclude that the Board's notice of the January 7, 2014 meeting as an event scheduled by two commissioners did not inform the public that

the Board itself would be meeting. The Board therefore violated the Act by meeting without giving the public reasonable advance notice of a meeting of the Board. The notices of the other meetings, while more accurate, also did not convey that a quorum of the Board would use the "Around the County" events organized by two commissioners to discuss public business. Those notices were also deficient.

We again[1] advise this Board: when three or more commissioners convene in one place, wherever that place might be, and then use that occasion to interact on public business, the event is a meeting of the Board, and the Board must comply with the Maryland Open Meetings Act. Further, if the Board has not given notice of a meeting of the Board, and no explicit exemption from the Act applies, the Board will violate the Act if it meets anyway. Failing a true emergency, the commissioners must not proceed with a meeting if the public has not been given reasonable advance notice that the event is open to the public. Even when a meeting is convened at the last minute because of a true emergency—there was none here—public bodies must provide the best notice feasible under the circumstances.

Finally, we decline Complainant's request for an investigation. The General Assembly did not delegate investigatory powers to us. Rather, the statutory procedures provide for our resolution of complaints on the basis of the complaint and response, and that is what we undertake to do here.

Discussion

A. The committees created by one commissioner

The Act applies only to entities that either fall within one of the Act's three definitions of the term "public body" or are deemed to function so much as a public body that a court would treat them as one. *See* State Government Article ("SG") § 10-505 (stating the general requirement that public bodies meet in open sessions) and SG § 10-502(h) (defining "public body"); *see also, e.g.*, *Andy's Ice Cream v. City of Salisbury*, 125 Md. App. 125 (1999)(deeming an ostensibly private corporation to be an instrumentality of the city, and thus a public body, in light of its public functions and the mayor's and city council's control over it).

The three statutory definitions focus on the way in which the group was created. The first definition in § 10-502(h) applies to multi-member

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[1] *See* 8 *OMCB Opinions* 19 (2012). Since then, the General Assembly has amended the Act to require the members of a public body to publicly announce, and acknowledge the receipt of, an opinion in which we have determined that the public body violated the Act. *See* SG § 10- 502.5(i).

bodies created by formal actions such as laws, resolutions, ordinances, bylaws, and rules. These committees were not created that way.

The second definition applies to multi-member bodies appointed by the chief executive authority of a political subdivision, or by a person under the "policy direction" of that authority, when at least two members are not employed by the subdivision. SG § 10-502(h)(2)(i). As to the first part of the definition, the "chief executive authority" in Carroll County is not an individual, but rather the Board of Commissioners. *See Board of County Commissioners of Carroll County v. Landmark Community Newspapers*, 293 Md. 595, 603-05 (1982) (explaining the form of Carroll County's government). The Board itself did not appoint these committees. As to the alternative to that part of the definition, it does not appear that the Board, a body of elected officials, has assumed control over each member's individual choices on how, and from whom, the member chooses to gather information. We therefore think it unlikely that any one commissioner would be deemed to be under the "policy direction" of the Board for these purposes. The committees do not meet this definition either.

The third definition applies only to multi-member bodies that were created at the State level of government; these committees were not. *See* SG § 10-502(h)(2)(ii). Finally, we do not deem the committees to be instrumentalities of the Board, as they were created and controlled by one commissioner, not the Board itself.

Complainant states that these committees were comprised of "hand-picked" members of the public and County employees and that they variously addressed subjects of interest to the general public, formulated reports behind closed doors, and then presented their findings to the Board during open Board sessions. She questions the exclusion of the general public from the committees' formulation of recommendations in the company of County employees. Nonetheless, these committees do not fall within the scope of the Act. Because we only have the authority to address violations of the Act, we dismiss the complaint against the committees. *See* SG § 10-502.4 (defining the Compliance Board's authority).

B. The "Around the County" meetings

With exceptions not relevant here, a quorum of the members of a public body may not convene to consider public business unless the public body has given "reasonable advance notice" of its intent to do so. *See* SG §§ 10-506 ("[b]efore meeting in an open . . . session, a public body shall give reasonable advance notice of the session") and 10-502(g) (defining "meet" as "to convene a public body for the consideration or transaction of public business). The General Assembly recognized that a quorum of members might find themselves in one place by happenstance, or for a social occasion, and so the Act does not apply to "a chance encounter, social

gathering, or other occasion that is not intended to circumvent the Act." SG § 10-503(a)(2); *see also* 8 *OMCB Opinions* 19 (2012) (explaining to this Board that the Act applies when they convene to consider public business; finding this Board in violation of the Act for charging admission to a meeting). When the Act does apply, the notice must identify the public body in question and include the date, time, and place of the public body's meeting. SG § 10-506(a); *see also* 1 *OMCB Opinions* 51, 56 (2004) (finding "deficient on its face" a notice that neither identified the public body nor specified the location); 8 *OMCB Opinions* 89, 93 (2012) (explaining to this Board the elements of proper notice). When a public body must meet on short notice to address an emergency, it must give the "best public notice feasible under the circumstances." 1 *OMCB Opinions* 38, 39 (1993).

Here, the County issued an announcement that stated that two commissioners, Commissioners Howard and Shoemaker, would hold five "Around the County" meetings in January and February 2014. That announcement, titled "Howard & Shoemaker/ Around the County Meetings," specified the dates, times, and places of each event, and listed the topics on which the two commissioners would be "presenting." The announcement further stated that the two commissioners were "also willing to accommodate the commissioner representing the district in which the meeting will be held with some time to make a brief presentation . . . ." The announcement shows, and the Board properly does not dispute, that the meetings involved the discussion of public business.

The County Board of Commissioners comprises five members, and it takes three members to create a quorum. The events scheduled by the two commissioners therefore would not be a meeting of the Board, and would not be subject to the Act *if* no other commissioner attended. The response states that the meetings "were originally intended to include only Commissioners Howard and Shoemaker." However, as we discuss below, additional commissioners attended each of the four events that occurred.

1. The January 7, 2014 "Around the County" meeting. The Board's weekly "notice and agenda" lists, in bold font, each "Board of County Commissioners Open Session" for the week. The notice and agenda also lists, in italics, various other events, along with the names of the various commissioners expected to attend them, or, in one case, the notation that the "Board of County Commissioners" would meet with another public entity. In italics, the notice and agenda for the week of January 6 listed an "Around the County Meeting," on January 7, gave the time and place for the event, and listed Commissioners Howard and Shoemaker as the commissioners in attendance. Also scheduled for that day, in bold font, was a "Board of County Commissioners Open Session" at 10 a.m. A person reading the notice and agenda thus would not have

expected the two commissioners' "Around the County Meeting" to be a meeting of the Board.

At the "Around the County Meeting," according to the Board's response, "Commissioners Frazier and Rothschild unexpectedly appeared and spoke on public issues." The Board at some point recognized that the event was a meeting subject to the Act, and it adopted minutes. The minutes state that "Commissioners Rothschild and Frazier also participated," that "therefore a quorum was present," and that "[n]o action was taken by the Board."

Additionally relevant to this meeting are the facts that are not present. Nothing in the submissions suggests that the two additional commissioners arrived at the appointed place by "chance." Nothing suggests that the events were "social gatherings" of the commissioners. Nothing suggests that an emergency compelled the two additional commissioners to attend the other commissioners' event, much less than to use it as an occasion to address public business; and nothing suggests that any commissioners withdrew from the meeting in order to avoid a violation of the Act.

We find that the Board met without having given reasonable advance notice to the public. The initial announcement did not provide adequate notice because a person interested in the Board's meetings would not have had any reason to read further. Even had that person read further, and understood what constitutes a quorum of the Board, the notice merely conveyed the possibility of a Board meeting. More likely, such a person would have deemed the Board to be meeting only at the times listed for meetings of the Board. The notice on the weekly agenda also did not provide adequate notice; it affirmatively conveyed the message that the event would be attended only by Commissioners Howard and Shoemaker. In short, the Board did not give notice that a quorum would convene that evening. The Board therefore violated the Act when the two additional members arrived to discuss public business.

The violation is not cured by the subsequent posting of minutes; as we explained in 8 *OMCB Opinions* 26, minutes do not substitute for the provision of the opportunity to observe the conduct of public business. Nor do these minutes mitigate the violation. While they broadly describe the topics discussed in terms that reflect the topics listed in the initial announcement, they give no indication of what was said. A person who missed the meeting because he or she did not know that the board was meeting thus would have had no way of ascertaining whether, for example, the Board continued to consider the public business that the Board discussed that morning.

The Board could easily have avoided this very basic violation of the Act. Here are some of the steps it could have taken: (1) The two commissioners who "unexpectedly appeared" could have chosen not to do so; or, (2) those commissioners could have made arrangements with those who had scheduled the event so that notice of a Board meeting could be given reasonably in advance; or, (3) upon the arrival of the two additional commissioners, any two commissioners could have left; or, (4) the event could have been discontinued; or, (5) if the commissioners had any doubt that the presence of three commissioners created a quorum of the Board, they could have suspended the meeting to seek the County Attorney's advice.

2. The January 14, 27, and 28 "Around the County" meetings. As with the January 7 meeting, these three meetings were listed in the Board's weekly notice and agenda. The January 14 meeting was listed as "Around the County Meeting" and the others were listed as "Around the County Meeting hosted by Commissioners Howard and Shoemaker." The listings for the January 14 and 27 meetings showed that Commissioner Rothschild would also attend; the listing for January 28 showed that Commissioners Frazier and Rothschild would also attend. As to each meeting, the minutes show that the additional commissioner or commissioners "also participated, therefore a quorum was present" and that "[n]o action was taken by the Board." Like the January 7 minutes, the minutes broadly describe the topics discussed and provide no additional information.

The notices for these meetings improved considerably on the January 7 notice in that these listings at least disclosed the likely presence of a quorum. Nonetheless, we are troubled by the fact that a quorum of the members of the Board discussed public business in a setting not expressly disclosed to the public as a meeting of the Board. We therefore conclude that these notices were also inadequate.

Conclusion

As we explained to this same Board in 8 *OMCB Opinions* 19 (2012), the occasions that a quorum of its members use to consider public business are Board meetings. Here, the Board posted its regular meetings as "Open Sessions" of the Board and then convened also at a separate series of meetings that it had not posted as meetings of the Board. We conclude that the Board violated the Act by holding those meetings without having given the public adequate notice that it would meet.

We further conclude that the committees created by one commissioner, on his own initiative and not at the behest of the Board, were not "public bodies" subject to the Act and therefore did not violate it.

Open Meetings Compliance Board

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